Supreme Court, U.S.
FILED
NOV 8 1999
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In The
SUPREME COURT OF THE UNITED STATES
No. 99-639

CIRCLE INDUSTRIES USA, INC.,
Petitioner,

v.

PARKE CONSTRUCTION GROUP, INCORPORATED,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

What is the "principal place of business" of an inactive corporation for purposes of determining its citizenship pursuant to 28 U.S.C. § 1332 and 28 U.S.C. § 1441?

LIST OF PARTIES TO THE PROCEEDING

In accordance with Rule 29.6, Parke Construction Group, Incorporated is not publicly traded, nor does it have a corporate parent. No publicly traded corporation owns10% or more of its stock.

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BASIS FOR SUPREME COURT JURISDICTION

The Judgment and Decree of the United States Court of Appeals for the Second Circuit was issued on July 15, 1999. The basis for jurisdiction in this Court is 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1332 (a) provides:

> The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between –
>
> (1) citizens of different States.

28 U.S.C. § 1332 (c) provides:

> For purposes of this section and section 1441 of this title –
>
> (1) a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business, . . .

28 U.S.C. § 1441(a) provides:

> Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal

under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

28 U.S.C. § 1441(b) provides:

> Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

STATEMENT OF FACTS

This action arises out of a dispute between Circle and Parke with regard to the performance of a Joint Venture Agreement between the parties. The Parke Construction/Circle USA Joint Venture worked on several construction projects in the Atlanta metropolitan area, the largest one being at University Apartments, part of the Atlanta Olympic Village project being built for the 1996 Summer Olympic Games.

After Circle essentially pushed Parke out of the Joint Venture, Parke filed an action in the United States District Court for the Northern District of Georgia seeking injunctive relief. The Court denied Parke's application for equitable relief and, as a result, it voluntarily dismissed the action and the parties agreed to resolve their disputes through arbitration before the American Arbitration Association in accordance with the terms of the Joint Venture Agreement.[1]

The arbitration was heard over five hearing days in the fall of 1996. At the hearings, the arbitrator heard from seven witnesses. Circle introduced 28 exhibits into evidence and Parke introduced 27. The arbitrator took possession of these exhibits, personally marking each document into evidence. The arbitrator reviewed each exhibit while testimony relating to the exhibit was being taken. After the hearing, the arbitrator directed each party to submit post-hearing briefs and, approximately one month later, reply briefs. In their briefs, the parties discussed and analyzed the evidence presented at the

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[1] Although the Joint Venture Agreement envisioned arbitration before three arbitrators, the parties agreed to proceed with one. The arbitration was conducted in New York City because the Joint Venture Agreement so provided.

hearing, both the witness testimony and the exhibits. After the submission of the briefs, the arbitrator declared the hearings closed on March 25, 1997. Thus, pursuant to AAA Commercial Arbitration Rule 41, the arbitrator had until April 24, 1997, 30 days after the close of the hearings, to render an award.

Some time prior to April 14, 1997, counsel received a telephone request from the AAA case administrator that the parties submit a duplicate set of exhibits which had been marked at the arbitration hearings. Parke submitted an extra copy of exhibits. Circle demanded that the request be put in writing, and the arbitration administrator complied. The additional copy of Parke's exhibits were forwarded to the arbitrator on April 14, 1997. The arbitration administrator acknowledged receipt of Parke's exhibits on April 17, 1997. By way of letter dated April 18, 1997, Parke's counsel cautioned the administrator that only those documents admitted into evidence should be submitted to the arbitrator.

> I would like to confirm that the only documents which the arbitrator has requested are those which were marked into evidence at the hearing. There were numerous other documents which were not marked as exhibits. I would object to the introduction of any of those documents to the arbitrator at this time. My records indicate that Circle introduced twenty-eight exhibits (C-1 to C-28). Please insure that only the marked exhibits are transmitted to the arbitrator.

Also on April 18, 1997, Circle objected to the submission of copies of the exhibits, demanding that the arbitrator convene a hearing for the parties to review and submit the additional copy

of the arbitration exhibits. Circle also requested that the arbitrator provide a list of the exhibits he did not have, so Circle would not have to produce duplicate exhibits.

On April 23, 1997, the arbitrator rendered an award in favor of Parke in the amount of $146,590, plus 8% post-award interest. The arbitrator also divided his compensation and the AAA's administrative fees 70% to Circle and 30% to Parke.

On May 6, 1997, Circle filed an action in the Supreme Court of New York, Nassau County seeking to vacate the arbitration award. On June 5, 1997, Parke filed a Notice of Removal, removing the action to the United States District Court for the Eastern District of New York in accordance with 28 U.S.C. § 1441. Parke removed the case because there was diversity jurisdiction in the District Court pursuant to 28 U.S.C. § 1332(a).

On August 7, 1997, Circle filed a motion to remand the suit to New York state court. Circle conceded that Parke was a Georgia corporation, but claimed that its principal place of business was New York and, thus, there was no diversity between the parties, since Circle's state of incorporation and principal place of business was New York. Circle's contention that Parke's principal place of business was in New York was based upon the hearsay statements from unidentified individuals that Parke's mail was being forwarded to its president, John Bowe, in New York and that certain settlement negotiations regarding other disputes arising from the Joint Venture's projects had taken place in New York. In his responsive Declaration, Mr. Bowe explained that the New York address mentioned in Circle's papers was for another corporation which he owned, which had no other affiliation with Parke and that the settlement negotiations in question had

in fact been conducted in Georgia. Mr. Bowe also explained that Parke's business had only been conducted in Georgia. Based upon the papers submitted, the District Court concluded that Parke's principal place of business was in Georgia and, thus, there was diversity jurisdiction.

In the meantime on June 13, 1997 Parke filed a motion to dismiss Circle's complaint and to confirm the arbitration award. Circle opposed the motion, arguing that the award was invalid because the arbitrator had violated AAA rules in the procedure used for the submission of additional copies of the parties' exhibits and, thus, did not receive a fair hearing. By way of Memorandum and Order dated October 8, 1998, the District Court granted Parke's motion and confirmed the arbitration award. Judgment was entered in accordance with the Court's Memorandum and Order on October 22, 1998. (Petitioner's App., A11) The District Court's judgment was affirmed by the United States Court of Appeals for the Second Circuit by way of Opinion and Order dated July 15, 1999.

CIRCLE'S PETITION FOR CERTIORARI SHOULD BE DENIED

Circle argues that the Court should grant its petition for certiorari because there is a split among the Circuits as to how the citizenship of an inactive corporation should be determined. *See* Sup. Ct. R. 10(a). However, regardless of which test were applied to the facts here, Circle would still lose because there is diversity between Circle and Parke under the Second Circuit test, under the Third Circuit test, and under the Fourth and Fifth Circuit tests.

Circle argued below that there was no federal jurisdiction because the parties were not diverse. Circle is a New York corporation with its principal place of business in New York. Parke is a Georgia corporation, formed for the sole purpose of entering into a joint venture agreement with Circle for construction projects in Atlanta. Parke's registered office was in Georgia and its registered agent resided in Georgia. After the parties last conducted construction work in late 1995, Parke closed its office in Georgia, its registered agent moved out of Georgia, so all of Parke's mail was forwarded its president, John Bowe, in New York. Since late 1995, Parke's only activity has been collecting various accounts in Georgia and prosecuting its claims against Circle.

For purposes of diversity jurisdiction and for removal, a corporation has two citizenships: it is a citizen of the state of its incorporation and the state of its principal place of business. 28 U.S.C. §1332(c)(1). Circle is a New York corporation with principal place of business in New York. Parke is a Georgia corporation. So long as Parke's principal place of business is somewhere other than New York, however "principal place of

business" is determined, the parties are diverse and there was jurisdiction in the District Court.

Both the Second and Third Circuits have a "bright line" test. In the Second Circuit, where this case was decided, an inactive corporation's principal place of business is the state where it last transacted business. Participating in a lawsuit does not constitute "transacting business" for jurisdictional purposes. *Pinnacle Consultants, Ltd. v. Leucadia National Corp.*, 101 F.3d 900, 907 (2d Cir. 1996); *Wm. Passalacqua Builders, Inc. v. Resnic Developers S., Inc.*, 933 F.3d 131, 141 (2d Cir. 1991). In *Passacqua Builders*, the court reasoned that since 28 U.S.C. § 1332(a) provided that a corporation is a citizen of both its place of its incorporation and its principal place of business, a court must consider both places to determine its citizenship for diversity purposes.

> Both the state of incorporation and the principal place of business should be considered in deciding whether diversity jurisdiction is present. To allow inactive corporations to avoid inquiry into where they were last active would give them a benefit Congress never planned for them, since under such a rule a defunct corporation, no matter how local in character, could remove a case to federal court based on its state of incorporation.

Passalacqua Builders, 933 F.2d at 141.

In the Third Circuit, an inactive corporation is a citizen only of its state of incorporation. *Midlantic National Bank v. Hansen*, 48 F.3d 693, 696 (3d Cir. 1995). The Third Circuit reasoned that since a corporation's "principal place of business"

is determined by its business activities, and an inactive corporation, by definition, has no business activities, an inactive corporation cannot have a principal place of business. *Midlantic*, 48 F.3d at 696.

The Fourth and Fifth Circuits have adopted a test based upon a consideration of the totality of the corporation's business activities. *Athena Automotive, Inc. v. DiGregorio*, 166 F.3d 288, 290-291 (4th Cir. 1999); *Harris v. Black Clawson Co.*, 961 F.2d 547, 550-551 (5th Cir. 1992). The Fourth Circuit in *Athena* followed the Fifth Circuit's reasoning in *Harris*. In *Harris*, the Fifth Circuit held that the Second Circuit's "bright line" test, that an inactive corporation's place of last business activity is its principal place of business, might lead to an unintended result, so that a "total activity" test should be used instead.

> To adopt a rule that the place of an inactive corporation's last business activity is *relevant* to determining its citizenship for subject matter jurisdiction purposes, especially where that activity took place in its last principal place of business is perfectly consistent with the "total activity" test. A rule that the place of an inactive corporation's last activity is *always determinative* of its citizenship for diversity purposes, however, has the potential to produce the odd result that an inactive corporation may be held to have its principal place of business in a jurisdiction in which it would never have been held to have its principal place of business when it was active, Surely Congress cannot have intended to produce this result either. Thus, a wholesale

> adoption of the "last activity test" would appear to be at odds with the "total activity" test. Therefore, we hold that, while the place of an inactive corporation's last business activity is relevant to determine its principal place of business, it is not dispositive.

Harris, 961 F.2d at 551 (emphasis in original). The Fifth Circuit went to hold that when a corporation has been inactive for a substantial period of time, like five years in that case, the place where its last business activity took place is not its principal place of business, and, in fact, the corporation may have no principal place of business. *Id.*[2]

The conflict among the Circuits is not as stark as Circle would have the Court believe. There is a difference between the Second and Third Circuits as to whether an inactive corporation can or must have a "principal place of business" for diversity purposes. The Second Circuit has held that an inactive corporation *must* have a principal place of business, and that principal place of business is where the corporation last conducted business. The Third Circuit has held that an inactive corporation necessarily *can't* have a principal place of business. However, the "total activity" test adopted by the Fourth and Fifth Circuits, while differently worded than the Second Circuit's test and expressly rejecting the Second Circuit's

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[2] Both in *Harris* and in *Athena*, the courts declined to apply the tests they had enunciated to find where the inactive corporation's principal place of business was, or to decide whether a corporation *must* have a principal place of business. Instead, they found that it was sufficient to rule that the inactive corporation's citizenship, whatever it might be, was something other than the citizenship of its adversary. *See Harris*, 961 F.2d at 551; *Athena*, 166 F.3d at 291-292.

reasoning, leads to the same result as the Second Circuit test in practice.

In determining where the corporation last conducted business for purposes of determining its "principal place of business", the Second, Fourth and Fifth Circuits take into account where the corporation actually did business, which can include winding up the affairs of the corporation if that is a significant "activity". *Compare Circle Industries U.S.A., Inc. v. Parke Construction Group, Inc.* 183 F.3d 105, 108 (2d Cir. 1999); *Athena Automotive*, 166 F.3d at 291-292; *Harris,* 961 F.2d at 551. Further, while the Second Circuit has held that an inactive corporation *must* have a principal place of business, and the Third Circuit has held that an inactive corporation *can't* have a principal place of business, the Fourth and Fifth Circuits have studiously, and intentionally, avoided deciding this issue. *Athena Builders*, *id.*; *Harris*, *id.* Obviously, there cannot be a split among the Circuits on an issue that two of the Circuits have not decided.

The standard proposed by Circle is actually different from that adopted by any of the Circuits. Rather than analyzing the totality of the inactive corporation's recent business activities, as the Second, Fourth and Fifth Circuits do, Circle proposes that only the very last action taken by the inactive corporation, the participation in the subject civil action, be considered for purposes of establishing its "principal place of business". *See* Petition, at 8-9. Indeed, Circle's standard is contrary to 40 years of existing precedent regarding the determination of the principal place of business of active corporations. When determining the "principal place of business" of an active corporation, there are different analyses used, depending upon the particular facts and circumstances, but each of those analyses considers the whole of the

corporation's structure and activities. *See generally* Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 2d § 3625.

> As is obvious from this discussion the determination of a corporation's principal place of business depends on the facts of each case. No simple test or single element is controlling. Rather, the courts must consider the entire corporation, its purposes, the activities it carries out, and the extent and location of these activities. The weight to be given these elements, however, is a question of law.

Id. at p. 637. In contrast, Circle proposes a rule whereby a single action, the participation in the subject lawsuit, determines an inactive corporation's principal place of business, rather than an analysis of the totality of the inactive corporation's recent activities.

By definition, under Circle's proposal, the inactive corporation's "principal place of business" would be the forum state, regardless of any other activities the corporation may or may not have been involved in, and regardless of when or where those activities may have taken place. The practical effect of this rule, that the inactive corporation is, by definition, a citizen of the forum state, would be to preclude removal under diversity jurisdiction if the inactive corporation were a defendant. *See* 28 U.S.C. § 1441(b). Moreover, if the suit were filed in the same jurisdiction as where the active corporation was either incorporated or had its principal place of business, there would be no diversity since the inactive corporation would assume the citizenship of the forum, where the adversary party was also a citizen.

Granting Circle's petition for a writ of certiorari in this case would be inappropriate because, regardless of how this Court were to resolve the conflict among the Circuits, Circle would still lose, because there would still be diversity between Circle and Parke. Parke's "principal place of business", if it had one, would not be in New York under any of the tests articulated by the Courts of Appeal. The Second Circuit correctly applied its own test and found that there was diversity between Circle and Parke. Circle is a New York corporation, with principal place of business in New York. Parke is a Georgia corporation, whose last business activities were conducted in Georgia. Thus, its principal place of business was in Georgia.

If the Court were to adopt the Third Circuit's test, the parties would still be diverse. Since Parke had ceased conducting business as of the time that this action was filed, it had no principal place of business. Parke is incorporated in Georgia. This citizenship is different from Circle's.

If the test of the Fourth and Fifth Circuits were used, there would still be diversity. As the Second Circuit noted, although Parke's mail was being forwarded to New York and it was participating in this litigation in New York, this did not constitute "transacting business". 183 F.3d at 108. The joint venture did business only in Georgia, last operated an office in Georgia, and hired attorneys in Georgia to collect its accounts receivable in Georgia. *Id.* Under all of the facts and circumstances, the weight of Parke's *business* activities was in Georgia. Thus, if Parke had a principal place of business, it was in Georgia. Again, the parties would be diverse and there would be jurisdiction.

Upon closer examination, however, it appears that Circle's real objection is to the Second Circuit's factual determination that, under the circumstances of this case, participating in this lawsuit did not constitute "transacting business" for purposes of determining Parke's principal place of business. The Second Circuit took into account that Parke had not been participating in any construction work since 1995 and, since that time, had been winding up its affairs in Georgia. Essentially, Circle contends that the Second Circuit improperly weighed the facts of the case, since it took into account the evidence in the record that all of Parke's activities in winding up its affairs took place in Georgia. This makes this matter particularly inappropriate for granting its petition for certiorari. *See* Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.")

Taking Circle's position as a whole, it is clear that its petition for certiorari must be denied. It proposes a rule of law which is contrary to all existing precedent. Further, regardless of whether the analysis of the Second, Third, or Fourth and Fifth Circuits is applied to the facts presented here, Circle would lose. There would be diversity between the parties. While there might be an appropriate case presented in the future, after further development in the Courts of Appeal, for this Court to decide the question of the principal place of business of an inactive corporation, this is not the case in which to make that determination.

CONCLUSION

For the reasons set forth above, Circle's petition for certiorari should be denied.

Respectfully submitted,

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